Supreme Court, U.S.
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No. 01-332

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF
INDEPENDENT SCHOOL DISTRICT NO. 92
OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL
DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS AND LACEY EARLS, MINORS, BY THEIR
NEXT FRIENDS AND PARENTS, JOHN DAVID AND LORI EARLS,
AND DANIEL JAMES, A MINOR, BY HIS NEXT FRIEND AND
MOTHER, LETA HAGAR,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

This case presents the extremely important question of whether there exist constitutional limits on public school districts that seek to monitor their students' illicit drug activity by imposing mass suspicionless urinalysis drug testing upon substantial portions of the student body population, including students who are not engaged in athletics or other physically hazardous activities.

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several cases, including cases involving the constitutional and civil rights of public schoolchildren. *Good News Club v. Milford School District*, 533 U.S. 98 (2001); *Owasso Indep. School Dist. v. Falvo*, Sup. Ct. No. 00-1073 (October 2001 session).

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[1] Counsel of record to the parties in this case have consented to the filing of all *amicus curiae* briefs on behalf of Respondents, pursuant to a blanket consent filed with the Court on January 29, 2002. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus respectfully submits that Petitioners' mandatory drug testing policy is unconstitutional because it is unreasonable both at inception and in scope. No legitimate "special need" justifies the program, and the program goes well beyond the scope of reasonableness by imposing mass, suspicionless testing on students who are not at particularized physical risk from drug abuse. Further, the program unacceptably infringes upon parental liberty interests to direct and control educational and medical decisions.

ARGUMENT

Like a majority of students in Pottawatomie County schools, most students in the United States are involved in an extracurricular activity, whether it is band, chess club, theater and drama, student government, athletics, cheerleading, prayer groups, French or Spanish club, community service, newspaper, yearbook, music lessons or computer club. If all such students are potentially subject to random urinalysis drug-testing without individualized reasonable suspicion and without any further showing of a special law enforcement or institutional need, then surely there is nothing to stop a school from simply drug-testing *all* of its students. After all, Petitioners have offered no reason to believe that students involved in extracurricular activities are more likely to be involved in drug use than other students. Intuitively, it would seem the opposite: the more students are engaged in the extracurricular life of the school, the less time and inclination they will have to get caught up in drug use. But if 18 million students, grades 7 through 12,[2] can be tested

[2] *See Vernonia School District v. Acton*, 515 U.S. 646, 666 (1995) (O'Connor, J. dissenting). See also Brief of Respondents at 6, n. 5 (citing federal data reflecting 23.7M students in grades 6-12).

without any suspicion they are using drugs, it seems clear that students have indeed shed their Fourth Amendment rights at the school house gate.

Petitioners' Drug Testing Policy.

The Court's *amicus* suggests that it is important to bear in mind in considering this case that Petitioners do not seek to justify their drug testing program as primarily a random selection program. Pursuant to the policy, all extra-curricular students are tested upon initiating participation in a listed extra-curricular activity. Brief of Petitioners ("Pet. Br.") at 9. Students are also subjected to testing if chosen by random sample, and if a "reasonable suspicion" provides a basis for testing. Pet. Br. at 9-10.

Students who wish to participate in the specified extra-curricular activities are potentially subjected to three types of testing: 1) a preliminary drug test required of *all* students who participate (conducted, notably, not by a student's personal physician, but by school officials in the same manner as a random drug test, *see infra*); 2) a random selection drug test that subjected a substantial number of participating students to testing; and 3) a drug test imposed "at any time when there is reasonable suspicion[3]

[3] See J.A. at 151-52, noting that approximately 500 students had undergone either inital or random testing in a two-year period. Petitioner's policy defines "reasonable suspicion" as

> a suspicion of illegal or performance-enhancing drug use based on specific observations made by coaches/administrators/sponsors of the appearance, speech,

to test for illegal or performance-enhancing drugs." J.A. at 197.[4]

Requirements for a Constitutional Search.

The Supreme Court has held that the taking of a urine sample and testing of the sample by urinalysis is unquestionably a "search" within the meaning of the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).[5]

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or behavior of an activity student; the reasonable inferences that are drawn from those observations; and/or information of illegal or performance-enhancing drug use by an activity student supplied to school officials by other students, staff members, or patrons.

J.A. at 196.

[4] Additionally, it is worth noting that while it may be that the policy mandates that drug testing results be placed "in confidential files separate from the students' other educational files," 242 F.3d at 1268, from there to be disclosed "only to those school personnel who have a need to know" and not to law enforcement authorities, this aspect of the policy cannot shield disclosure of the results from third party law enforcement authorities pursuant to the provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (as amended by P.L. 107-56, Title V, § 507, new subsection 1232g(j)). *See Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Falvo v. Owasso Independent School District No. I-011*, 229 F.3d 965 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 2547 (2001). The results remain "educational records" within the meaning of FERPA, and subject to disclosure upon court order. 20 U.S.C. § 1232g(j).

[5] "It is not disputed ... that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee,

Ordinarily, "in the absence of any basis for suspecting [an accused] of misconduct, the balance between the public interest and [an accused's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979). In view of this principle, the Supreme Court in a variety of Fourth Amendment contexts, ranging from *Terry* stops to "special needs" searches and school searches, has stressed that intrusions on the constitutionally protected right of privacy "should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard has two parts: 1) Whether the search was "justified at its inception *based upon reasonable, individualized grounds* for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726 (emphasis added), citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968); and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Amicus* believes Petitioners' suspicionless drug testing policy is unreasonable both at inception and in scope, and unacceptably infringes upon parental liberty interests to control educational and medical decisions.

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including whether he or she is epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 618. In assessing the constitutional validity of such drug testing programs, the Court has not differentiated the initial taking of the urine sample as an independent "seizure," but rather treats it as a component of the Fourth Amendment search. *Skinner*, 489 U.S. at 618 ("In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure"); *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001).

I. THE TENTH CIRCUIT PROPERLY FOUND THAT A SCHOOL DRUG-TESTING POLICY, THE PURPOSE OF WHICH IS NOT TO SAFEGUARD THE PHYSICAL HEALTH AND SAFETY OF STUDENTS BUT TO SERVE A GENERALIZED DESIRE TO COMBAT A PERCEIVED DRUG PROBLEM, IT NOT "JUSTIFIED AT ITS INCEPTION" AND HENCE IS CONSTITUTIONALLY INVALID.

Without question, as the Court noted in *Vernonia School Dist. 47J v. Acton*, *supra*, in certain circumstances, "special needs" justify dispensing with the warrant and probable cause requirement of the Fourth Amendment. 515 U.S. at 574, citing *New Jersey v. T.L.O.*, 469 U.S. 325. However, neither the application of the "special needs" doctrine nor the standard of "reasonable suspicion" enunciated in *T.L.O.* was expressly held by the Court to be applied wholesale to all searches in public schools; rather, as the Court subsequently clarified in *Chandler v. Miller*, 520 U.S. 305 (1997), *Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001), the application of the "special needs" doctrine must be applied on a program-by-program basis.

The Supreme Court has typically scrutinized Fourth Amendment searches imposed on a programmatic basis more closely than searches conducted by officers or officials in the field pursuant to their properly delegated authority. "Blanket searches, because they can involve 'thousands or millions' of searches, 'pose a greater threat to liberty' than do suspicion-based ones, which 'affect one person at a time.'" *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting). This is appropriate in light of the Court's recurring observation that the Fourth Amendment

"functions differently" from other constitutional protections in the criminal justice process; it prohibits unreasonable searches or seizures whether or not the evidence is ever used in a criminal proceeding, and a violation of the Amendment is "fully accomplished" at the time of the unreasonable governmental intrusion. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984). *T.L.O.* was an example of the latter type of suspicion-based search case, standing for the principle that individual searches by school officials on a "reasonable suspicion" basis to investigate breaches of school disciplinary rules are not "unreasonable" searches in contravention of the Fourth Amendment. 469 U.S. at 341. However, later authority has affirmed that an analysis of whether "special needs" exist to justify a search is appropriate in cases that assess the constitutionality of such programs. "Our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Edmond*, 121 S.Ct. at 457. The Court explained in *Edmond*:

> While "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.

Id. The Court added further clarity to this matter in *Ferguson*:

> In *Chandler*... we did not simply accept the State's invocation of a "special need." Instead, we carried out a "close review" of the scheme at issue before concluding

> that the need in question was not "special," as that term has been defined in our cases. In this case, a review of the [drug testing] policy plainly reveals that the purpose actually served by the [hospital's] searches "is ultimately indistinguishable from the general interest in crime control."

121 S.Ct. at 1290, quoting *Indianapolis v. Edmond*, 121 S.Ct. at 458. The Court expressly distinguished search cases that turned on a case-by-case balancing test based on "reasonableness." 121 S.Ct. at 1291, n. 21, distinguishing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). One key basis for distinguishing those cases was that they did not involve "the intrusive search of the body." *Id. Accord Edmond*, 121 S.Ct. at 461 (Rehnquist, C. J., dissenting). Likewise, in *Edmond,* the Court reviewed the state's purpose for the roadblock program, and found that it did not constitute a "special need." 121 S.Ct. at 458 ("we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control").

The Tenth Circuit appropriately recognized this two-step analysis as articulated in controlling authority in that Circuit, *19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998), in which the Court of Appeals correctly observed that the Supreme Court in *Chandler* "added a step to the analysis [of] *Skinner*, *[National Treasury Employees' Union v.] Von Raab* [489 U.S. 656 (1989)], and [*Vernonia*]." 156 F.3d at 1072; *Earls*, 242 F.3d 1269. That step "requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests." 242 F.3d at 1269. This "two-fold inquiry" is first, whether the proffered governmental concerns were "real;"

and second, whether the program "met the related goals of detection and deterrence." *Id.* Applying this test, the Tenth Circuit held that no "special need" existed to justify the random drug testing of city employees at issue in *19 Solid Waste Mechanics*. 156 F.3d at 1074-75. The court thus declined to proceed to the next step of the "special needs" analysis, the balancing of governmental and private interests. *Id.* While the court in *Earls* noted the two-step analysis in *Solid Waste Mechanics*, it felt it was bound by the Supreme Court's decision in *Vernonia* that the "special needs" doctrine applied to random drug testing in public schools, and hence applied the "reasonableness" test to invalidate the program. 242 F.3d at 1270.

Applying the "special needs" analysis to the Petitioners' drug testing policy, it is clear from the record below that Petitioners could not demonstrate that any hard evidence of drug usage existed before the policy was put into place. The main proponent of the policy, Dean Rogers, repeatedly testified that the primary purpose of the policy was not to ensure the safety of extra-curricular participants, but to safeguard the reputation of the school district:

> Q. ....If the Tecumseh High School Math Club members wanted to compete to see who could do the calculations the fastest, would that make them subject to this drug testing policy?
>
> A. No, because they're not in competition with other schools.
>
> * * * *
>
> .... They're just being competitive among theirselves [sic]. They're not going out into the community and representing Tecumseh school per se as a Math Club that is going to a competition.

A. Okay. So the key to understanding who is included under this drug testing policy is that it is students who represent the school in competitions with other schools?
A. Yes.

J.A. at 73-74 (excerpt of deposition of Dean Rogers, pp. 40-41).

For example, Rogers testified regarding band members who are subject to the policy:

Q. .... You're not saying that there is any danger of [band members] seriously injuring themselves or other people; that's not a reason for this drug testing policy for the band, is it?
A. No.

J.A. at 77 (Rogers deposition, p. 47). Rogers testified that drug-related incidents that might prove "embarrassing" to the school as a whole provided the rationale for subjecting band members to the testing policy. *Id.* at 78 (Rogers deposition, pp. 47-48). The same rationale applied to the school's vocal group, Rogers testified:

A. .... not keeping up with the place they are supposed to be and things like that. That could possibly eliminate them from competition. you know, where they wouldn't present theirself [sic] well and things like that.

J.A. at 79 (Rogers deposition, p. 49). While Dean Rogers did point to the risk that a performer could fall off the stage, J.A. at 78 (Rogers deposition, p. 48), she acknowledged that this danger was combined with the concern that a vocal student would not

represent Tecumseh well. J.A. at 79 (Rogers deposition, pp. 49-50).

Dean Rogers readily admitted that the academic team would not be subjected to increased physical danger in performances because of drug use:

A. Academic team, I don't know that it would be physical. They're competing, but they have to present theirself [sic] well to us and to, you know, whoever they're competing with.
Q. Okay.
A. But as far as the physical they shouldn't unless they fall down or something like that. They shouldn't be really physical unless they're horseplaying, you know what I mean.

* * * *

And I feel like whether it is physical or nonphysical since athletes and all of those have to be, I think it's only fair that they be tested, too.
Q. And there's not any element of physical danger there, is there?
A. No.

* * * *

Q. It's simply that, in your opinion, the students who represent the school in competition need to put forth their best effort and best represent the school and that drugs might interfere with that; is that right?
A. Correct.

J.A. at 82-83 (Rogers deposition, pp. 63, 67). Based upon the record before the Court, it cannot be said that the purpose of the

program is a constitutionally cognizable one, such as student health, safety or discipline. Consequently, the program fails the first prong of the two-part "special needs" analysis: it was not "justified at its inception," and the Tenth Circuit therefore correctly reversed the District Court.

II. The Tenth Circuit Properly Concluded that a School Drug Testing Policy that Does Not Employ an Individualized "Reasonable Suspicion" Standard to Test Students in the General Student Body Population is Not "Reasonable in Scope."

The majority in *Vernonia* expressed resistance to a requirement that schools demonstrate that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment"). The majority's rather offhanded dismissal of the argument that suspicion-based drug testing was a "less intrusive means" to the same end is not consistent with statements in many of the Court's other "special needs" cases, and appears to flout the central rule of *Terry* stop jurisprudence (the progenitor of the "special needs" exception) that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)). *See also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (the investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's

suspicion in a short period of time"). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Terry*, 392 U.S. at 28.

The majority's further rationales for rejecting a "less restrictive means" analysis, practicality and a fear of arbitrary enforcement, are also puzzling:

> Respondents' alternative entails substantial difficulties – if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.

As to the first rationale, it is no answer to suggest that majoritarian pressures pose an impediment to the imposition of a drug testing program. In fact, in the instant case, "[n]o one who attended that meeting [the school board meeting at which the proposed drug testing policy was discussed] was reported to have objected to suspicionless drug-testing of school children." Brief of the United States in Support of Petitioners at 5, citing C.A. App. 78. (*But see Amicus* Br. of 19 Parents and Grandparents of Current and Former Pottawatomie Sch. Dist. Students (opposing program). Assuming, *arguendo*, that parents in the Pottawatomie community wished to impose a suspicion-based drug testing program, there is simply no support for the proposition that political considerations presented a hurdle. Moreover, Petitioners note that

the Court has displayed a "sensitivity" to educators *because of their responsiveness to parental accountability.* Brief for Petitioners at 16, citing *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting) ("In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.'"). This is simply another way of stating that school boards and officials are subject to majoritarian pressures. *Cf. Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 305 (2000) (neither school district's adoption of "solemnization" policy nor student elections for "solemnizer" saved constitutionality of policy permitting student prayer before athletic events). However, "[Fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.*, quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). Neither the facility nor the difficulty associated with imposing a suspicion-based drug testing policy through elected representatives has anything to do with the constitutionality of such a regime.

Further, the potential "arbitrary" application of a suspicion-based policy turns the doctrine of "special needs" searches on its head. It is certainly true that no irreducible requirement of individualized suspicion is imposed by the Fourth Amendment in all circumstances. *United States v. Martinez-Fuerte*, 428 U.S. at 560-561, *Camera v. Municipal Court*, 387 U.S. 523 (1967). However, "*exceptions to the requirement of individualized suspicion* are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other

safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" *T.L.O.*, 469 U.S. at 342, quoting *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979) (citations omitted; emphasis added); *Indianapolis v. Edmond*, *supra*. In other words, the Court has looked to the propensity of the search to be abused as a factor in considering the constitutionality of a *non-individualized* search, not to call into question suspicion-based searches. Generally, the requirement of a finding of "reasonable suspicion" based upon "articulable facts" is said to fulfill the function of serving as a bulwark against arbitrary enforcement and abuse. *See Terry v. Ohio, supra*; *Whren v. United States*, 517 U.S. 806 (1996); *Illinois v. Wardlow*, 528 U.S. 119 (2000).

Petitioners have acknowledged engaging in virtually continuous monitoring of student activities on the campus, employing cameras and monitors in the hallways and "sniff" searches by drug canines. Now the District, fearful that these extreme intrusions within the halls, classrooms and locker rooms of the District's campuses are insufficient to prevent covert drug activity *off campus*, wants the power to take the final step and monitor the students' blood streams for illegal substances. But it cannot be gainsaid that there is no "drug exception" to the Fourth Amendment. *Skinner v. Railway Labor Executives' Assoc*, 489 U.S. at 641 (Marshall, J., dissenting). If the decision of the Tenth Circuit is reversed, this Court will have sanctioned just such a "drug exception" to the rule of reasonable suspicion articulated in *T.L.O.* The Pottawatomie School District, having extended its drug policy to the last full measure of intrusiveness in furtherance of a questionable purpose – saving itself from "embarrassment" by its own students – and based largely upon hearsay anecdotal reports of "widespread drug use," will have been rewarded by this Court with the authority to

impose a solution that maximizes intrusion on student privacy.

III. Absent Individualized Reasonable Suspicion, Petitioners' Student Drug Testing Policy Unacceptably Intrudes Upon the Right of Parents to Direct and Control their Childrens' Educational Choices and Medical Treatment.

The guarantee of personal privacy within Respondents' families and in their children's bodies has long been recognized in a plethora of cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); and *Pierce v. Society of Sisters*, 268 U.S. 510 at 535 (1925). Both before and after birth, parents possess a Fourteenth Amendment right to direct and control their children's medical care as well as other significant aspects of nurture, education and upbringing. *Meyer, supra*; *Pierce*, 268 U.S. at 535.

Here, the parents of participating students cannot be said to have given their full informed consent to the urinalysis testing, since participation in extracurricular activities by their children is not purely "voluntary." The Court rejected the argument that "voluntary" student participation rehabilitates otherwise unlawful state action in *Lee v. Weisman*. "The argument lacks all persuasion.... Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions...." 505 U.S. 577, 595 (1992) (Kennedy, J., concurring). In the same way, participation in extracurricular activities may be, strictly speaking, "voluntary," but it forms a significant, and often central, part of a student's educational experience, one that is critical not only to college and university

admissions committees but also to employers and to the full development of the intellectual, social and emotional capacities of the student. Just as the Constitution "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation," *id.* at 596, it forbids the State to exact a sacrifice of fundamental Fourth Amendment liberties as the price of participating in the essential extracurricular life of the student body. "This is the calculus the Constitution commands." *Id. See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, at 1416 (1989), and cases cited at nn. 4-6.[6]

"An essential, distinguishing feature of the special needs cases is that the person searched has consented.... The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word." *Ferguson*, 121 U.S. at 1295 (Kennedy, J., concurring), citing *Skinner*, 489 U.S. at 615; *Von Raab*, 489 U.S. at 660-661; *Vernonia*, 515 U.S. at 650-651. *Cf. Ferguson*, 121 S.Ct. at 1296, n.1 (Scalia, J., dissenting) ("in all of those cases [citing *Chandler*, *Vernonia*, *Skinner*, *Von Raab*], the urine was obtained involuntarily").

Where parental "consent" cannot be said to be truly voluntary, but is factually and legally coerced, the notion that parental consent

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[6] Cases for the proposition that government cannot condition a right, benefit or privilege upon the coerced relinquishment of a constitutional right are legion. Those cited by Professor Sullivan include *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Unemployment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

to the testing vitiates the constitutional concerns engendered by the program is a constitutional *non sequitur*. A parent's relationship with his or her child, whether born or unborn, is considered a fundamental right that cannot be denied absent due process. *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). Although the interests of the State in protecting children may override parental rights in the presence of reasonable suspicion or probable cause in certain circumstances (necessitating intervention by school authorities in the educational context, or child protective services authorities in the home), in the absence of such particularized suspicion, the rights of parents must control. While the State has an interest in combating drug abuse on school campuses, this is a relatively recent interest in jurisprudence. An interest newly assertable is not protectable if it derogates a substantive liberty interest traditionally recognized as protectable. *Smith v. Org. of Foster Families*, 431 U.S. 816, 846 (1977). Conflict between perceived interests must be resolved by the one giving way to the deeply rooted and traditionally recognized right. *Michael H. v. Gerald D.*, 419 U.S. 110, 128-31 (1989). When the state both establishes a system of extra-curricular activity, which stands as an important benchmark of scholastic achievement, and conditions participation in that system on foregoing the important constitutional rights of privacy and parental control, its proffered interest in controlling perceived drug abuse cannot predominate in the absence of reasonable suspicion.

CONCLUSION

The Court's *amicus* respectfully submits that the need to revisit so soon after *Vernonia* what should have been an established area

of constitutional law after that decision arose because *Vernonia* did not actually state a workable, predictable rule for school drug testing program cases. This is clear from the Court of Appeals' inability to discern from its reading of *Vernonia* whether that decision approved drug testing based upon school officials' tutelary care of students, thus implying that general drug tests would pass constitutional muster; or whether it was based upon the demonstrated rampant drug abuse problem at this particular school:

> What is unclear from a simple reading of *Vernonia* is whether the Court's finding of a special need was based upon the school setting alone, with the concomitant need for school officials to maintain order and discipline, yet fulfill their tutelary and custodial obligations, or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools.

242 F.3d at 1271, n. 6. While the majority opinion was long on rationale for approving the program at issue in that case, a rationale is not a rule; nor is a ruling ("vacated and remanded" in that case) a rule, in the sense that it does not supply reasonably delineated standards for courts and advocates to apply in order to predict outcomes in similar cases. The Court should take the opportunity presented by the present case to provide specific and clear guidance about the meaning of *Vernonia*, and to limit its application to circumstances in which protection of the health and safety of student athletes who are active participants in the drug culture is the purpose and scope of the program.

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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